

**VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF FINANCIAL ASSURANCE
ABILITY TO PAY GUIDANCE
BANKRUPT ENTITIES**

Effective: 5-1-1998; amended: 7-1-2002

The policies and procedures set forth in this document are intended solely for the guidance of employees of the Department of Environmental Quality (Department). They are not intended to, nor do they constitute rulemaking by the Department. They may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how the Department applies this guidance in any given case will depend on the facts of the case.

1. Introduction

This guidance applies in the following situations:

- The Department of Environmental Quality (Department) has identified a person who has filed for bankruptcy as the responsible person (RP) for a petroleum release or discharge of oil and the person claims inability to pay for remediation costs or the amount due pursuant to applicable cost recovery guidance.
- A person who has filed for bankruptcy claims inability to pay civil charges during an enforcement action.

2. Authority

Section 9003(h) of Subtitle I of the Resource Conservation and Recovery Act (RCRA) and Virginia Code § 62.1-44.34:11 provide authority for considering an RP's ability to pay in State Lead referrals and in cost recovery matters. Virginia Code § 10.1-1316 of the Air Pollution Control Law provides authority for considering a person's ability to pay a civil charge in enforcement cases involving violations of the APCL and applicable regulations. Pursuant to the Department's Enforcement Manual, the Department may reduce a calculated civil charge where a facility demonstrates that a significant economic hardship would result from imposition of the full civil charge.

3. Definitions

The definitions contained in RCRA Subtitle I, the State Water Control Law, Air Pollution Control Law and the Virginia Waste Management Act apply.

4. Review Timing

4.1 Enforcement Program

As part of the enforcement process, the Office of Financial Assurance (OFA) generally performs the Ability to Pay analysis upon the request of Regional Office (RO) staff during consent order negotiations.

4.2 Petroleum Site Remediation Program

In the petroleum storage tank program, OFA performs an Ability to Pay analysis at the request of RO staff to determine whether it is appropriate to clean up a site through the State Lead program or to require the RP to conduct the cleanup. Generally, for any site that is classified as a Priority One¹ site or a site which needs assessment to determine the priority, the RO case manager need not wait for the Ability to Pay analysis results to proceed with State Lead referral². For any other type of site where the RP claims inability to pay for the necessary remediation, the RO case manager should request an Ability to Pay analysis and wait for the results before enrolling a site in the State Lead Program.

OFA staff review the application for completeness within fifteen (15) days of its receipt and complete the Ability to Pay analysis and issue a written decision within thirty (30) days of receipt of a complete application. This 30-day period may be extended if the analysis results warrant further inquiry into the applicant's financial status.

5. Bankruptcy Applicability

Although an RP may prove to the Department's satisfaction that he has filed for bankruptcy protection, evidence of bankruptcy is taken into consideration only in certain circumstances.

5.1 Generally, Bankruptcy Proceedings are Irrelevant

Bankruptcy does not affect an RP's obligation to perform any necessary environmental compliance measures³.

¹ A Priority One site is a site where humans or other sensitive receptors (usually a biological receptor or a surface water stream) are impacted by the release. (State Lead Program Interim Operations Guide, effective date: December 15, 1995.)

² However, in most cases, an Ability to Pay analysis is required after the referral to determine whether State Lead costs will be recovered from the RP.

³ 28 U.S.C. § 959(b) provides:

[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such

5.2 Exceptions

5.2.1 Enforcement Program: The Department will evaluate the bankruptcy petition and any other bankruptcy filings, the status of the bankruptcy case and the nature of the Department's claims in determining whether or not to pursue a civil charge.

5.2.2 Petroleum Site Remediation Program: RO staff may take an RP's ability to pay corrective action costs into consideration when determining whether to require an RP to clean up a contaminated site or to use State Lead funds to clean up the site.⁴

6. Application Procedures

6.1 Application Requests

When an RP has claimed inability to pay for response costs or civil charges, RO personnel may request an Ability to Pay analysis from OFA. The first step is to request an Ability to Pay application from OFA. The request must include:

- Responsible person name.
- Responsible person address.
- Responsible person telephone number(s).
- Pollution complaint number (PC#), permit number, or registration number (if applicable).
- Site Name.
- Number and type of occurrences.
- Release report date (for petroleum releases or discharges of oil).

trustee, manager, or receiver according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

11 U.S.C. § 362(b)(4) provides that actions by a government unit to enforce its police power or regulatory powers, e.g., requiring a debtor to clean up contaminated property, are excepted from the automatic stay applicable to administrative and judicial proceedings.

⁴ Although corrective action activities are "compliance measures" as discussed in section 5.1, because of the existence of the Virginia Petroleum Storage Tank Fund, the Department, as a matter of policy, will take into consideration an RP's ability to pay these types of costs.

- Identification of the RP's type of business entity as any one of the following:
 - Individual/sole proprietorship;
 - Bankrupt;
 - Corporation;
 - Partnership;
 - Estate;
 - Non Profit Organization;
 - Municipality
 - Other (limited liability company, other entity, etc.);
- Preferred application filing deadline, if less than thirty (30) days.

Note: Only RPs identified as bankrupt under this subsection are evaluated pursuant to this procedure. RPs identified as another type of entity are evaluated according to the appropriate procedure.

6.2 Application Preparation

When RO staff request an Ability to Pay application and provide the information listed in this subsection to OFA, the Financial Responsibility Manager (FRM) prepares the Ability to Pay Application Instructions (Appendix 1) as indicated below and sends the Application Instructions and the Application (Appendix 2) to the RP at the address indicated in this subsection.

6.2.1 Applicant Information

The FRM fills in the applicant name, address, telephone number, date the application was sent, PC#/permit#/Registration# (if applicable) and site name on the Application Instructions before mailing and marks on the instruction form the documents which the RP must include with the application.

6.2.2 Documents to Request for Potentially Bankrupt Applicants

Bankruptcy Ability to Pay Application: For potentially bankrupt RPs, the RP must file an Bankruptcy Ability to Pay application if he has filed bankruptcy proceedings in a U.S. District Bankruptcy Court.

Bankruptcy Petition: The RP must provide a copy of the date-stamped bankruptcy petition to the FRM as part of his Ability to Pay application.

Financial Responsibility Demonstration: In the case of a petroleum release or discharge of oil, if the RP had a duty to demonstrate financial responsibility at the time of the release report, the RP must submit the financial responsibility demonstration mechanism in effect at the time of the release report along with the application.

Insurance Policy: In the case of a petroleum release or discharge of oil, RPs must submit a complete copy of any/all insurance policy(ies) relating to the site in effect at the time of the release report. At the discretion of the FRM, an insurance certification (Appendix 3) may be requested in lieu of the policy(ies).

Gallonge/Storage Capacity Affidavit: If the occurrence was for a regulated, partially deferred, deferred or excluded underground storage tank, a gallonge affidavit (Appendix 4) is required. If the occurrence was for an exempt UST or small heating oil aboveground storage tank, no affidavit is required. If the occurrence was for a regulated or unregulated aboveground storage tank facility, a storage capacity affidavit (Appendix 5) is required.

Other: The applicant must submit any additional information requested on the Application Instructions.

6.3 Application Submittal

The RP must submit an original, signed Ability to Pay application to the mailing address and by the filing deadline specified in the Application Instructions.

6.4 Application Tracking

OFA staff update the necessary Ability to Pay fields in the relevant Comprehensive Environmental Database System (CEDS) module at the time of application issuance and receipt and when the evaluation is complete. OFA staff should utilize this database to track filing deadlines and claim disposition.

7. Review Procedures

Generally, a copy of the date-stamped bankruptcy petition is sufficient evidence to support a claim of inability to pay civil charges in an enforcement action; however, for petroleum site remediation cases, the FRM will proceed differently. Upon receipt of the Ability to Pay application, the FRM should contact the Bankruptcy Trustee⁵ and ascertain the amount of assets available in the

⁵ For the purposes of this procedure, the term Trustee includes receivers, managers and debtors in possession.

bankrupt estate for satisfaction of administrative expenses⁶. The FRM should obtain a letter from the Trustee documenting the available assets, if possible. If the amount of available assets exceeds the cost of completing the next phase of site cleanup, the RP is able to pay for the cleanup and the FRM communicates this result to both the RP and the Trustee as described in Section 8. If the amount of available assets is less than the next phase of cleanup then the RP is unable to pay and the FRM communicates this result as described in Section 8.

Effect of Discharge⁷

In instances in which the RP filed bankruptcy proceedings in Bankruptcy Court before the release report date or before the Department discovered the violations leading to the enforcement action, the FRM verifies that the RP did not receive a discharge from the Bankruptcy Court before the date of the release report or before the Department discovered the violations. If the bankruptcy proceeding concluded and the RP received a discharge through the Bankruptcy Court before the release report date or before the Department discovered the violations leading to the enforcement action against the RP, then the Department will not consider the completed bankruptcy as evidence of the RP's inability to pay. Instead, the RP should be directed to file the appropriate type of ability to pay application (e.g., corporate, individual or partnership application).

If the RP has not received a discharge from the Bankruptcy Court and the bankruptcy is still open at the time of the release report date or violation discovery date, then the FRM follows the procedures set out above in this Section.

8. ATP Recommendation

In the case of a petroleum release or discharge of oil, OFA staff provide a final written indication of ability to pay to the Bankruptcy Trustee with copies to the appropriate Regional Office.

OFA staff also provide a written indication of ability to pay to the appropriate RO via memorandum. Upon receipt of a memorandum indicating inability to pay, RO staff should investigate further to locate other RPs for the site. If the FRM performs the Ability to Pay analysis pursuant to an enforcement action, OFA will provide a written summary of the analysis to the RO enforcement specialist via memorandum only, unless the RO requests otherwise.

⁶ In most cases, costs necessary to clean up contaminated property that is part of the bankruptcy estate are considered administrative costs (those necessary expenses incurred to preserve the bankruptcy estate). Under the Bankruptcy Code, when determining which costs to pay from the bankruptcy trust, administrative expenses receive priority over unsecured claims.

⁷ A discharge is the release of a bankrupt entity from all of his debts which are provable in bankruptcy, except those excepted by the Bankruptcy Act. The discharge of the bankrupt entity is the step that regularly follows the adjudication of bankruptcy and the administration of the debtor's estate. By it the debtor is released from the obligation of all his debts that were or might be proved in the proceedings, so that they are no longer a charge upon him. Black's Law Dictionary 417 (5th ed. 1979).

In the petroleum program, if the Department requires an RP to undertake site cleanup after performing an ATP analysis, the RP may file a second ability to pay application (and subsequent applications, where applicable) during the course of the cleanup if the applicant articulates changed circumstances that have resulted in the deterioration of its financial condition since the time of the prior application.

9. Suspensions

Where an RP has failed to submit the required application materials by the filing deadline (usually, within thirty (30) days of the date the claim form was mailed) and has failed to obtain an extension of the deadline, the FRM may suspend any further analysis, deem the RP able to pay and refer the RP to the Regional Office for appropriate action. In the case of a petroleum release or discharge of oil, while RPs are participating in the Ability to Pay Program and are in compliance with the requirements of the Program (i.e., have not missed applicable filing deadlines), remediation activity requirements and report filing deadlines with respect to the occurrence for which the Ability to Pay application was issued are held in abeyance. RO report filing deadlines may run concurrently with Ability to Pay application filing deadlines.

10. File Of Record

Upon receipt of a request for an ability to pay application, OFA staff will establish an ability to pay file. All information and analyses will be maintained in each applicant's file for a period of 5 years or until site closure, whichever is longer. After this time, the file will be destroyed.

Director, Division of Waste Program Coordination

Date

ABILITY TO PAY GUIDANCE
BANKRUPT ENTITIES

APPENDIX 1
ABILITY TO PAY
APPLICATION INSTRUCTIONS

ABILITY TO PAY APPLICATION INSTRUCTIONS

Applicant Name:	
Address:	
Telephone Number:	(H) _____ (W) _____
Date Application Sent:	
PC#/Permit # and Site Name	

To complete the Ability to Pay application, you must submit the documents marked below:

INDIVIDUAL/PARTNERSHIP APPLICANTS

- _____ 1. A **signed** copy of your three most recent federal individual income tax returns including **all schedules**.
- _____ 2. A copy of the W-2 forms and 1099 forms used to support your most recent tax returns.
- _____ 3. A completed, **signed and notarized** Ability to Pay Claim form.
- _____ 4. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- _____ 5. A completed, signed and notarized Certification of Annual Gallonage.
- _____ 6. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- _____ 7. A completed, signed and notarized AST Storage Capacity Affidavit.
- _____ 8. A list of all general partners, using the form enclosed.
- _____ 9. Other: _____

BANKRUPT APPLICANTS

- _____ 1. An original **signed and notarized** Ability to Pay Bankruptcy Application form.
- _____ 2. A date-stamped copy of your Bankruptcy Petition.

- _____ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- _____ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- _____ 5. A completed, signed and notarized Certification of Annual Gallonage.
- _____ 6. A completed, signed and notarized AST Storage Capacity Affidavit.
- _____ 7. Other: _____

CORPORATE/PARTNERSHIP APPLICANTS

- _____ 1. A completed, **signed and notarized** Corporate Ability to Pay Claim form and all documents requested in the Claim form.
- _____ 2. A completed, signed and notarized Partnership Ability to Pay application form and all documents requested in the application form.
- _____ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- _____ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- _____ 5. A completed, signed and notarized Certification of Annual Gallonage.
- _____ 6. A completed, signed and notarized AST Storage Capacity Affidavit.
- _____ 7. Other: _____

LOCAL GOVERNMENT APPLICANTS

- _____ 1. A completed, **signed and notarized** Local Government Ability to Pay Claim Application and all documents requested in the Application form.
- _____ 2. Other: _____

FILING DEADLINE

The deadline for submission of these documents is _____ calendar days from the date these instructions were sent to you.

ADDITIONAL REQUIREMENTS

If you are involved in a site remediation for a petroleum release, depending on the results of the initial analysis, you may be required to submit estimates of the cost of performing the next phase of corrective action required at the site. If estimates are required, the Department will contact you.

WHERE TO SUBMIT APPLICATION AND OBTAIN ASSISTANCE

Please submit all application materials to: **Department of Environmental Quality, Office of Financial Assurance 5th Floor, P. O. Box 10009, Richmond, VA 23240-0009.**

If you require assistance in completing the application materials, please call _____ at _____.

SPECIAL INSTRUCTIONS

cc: Regional Office:

____ PRO
____ TRO
____ NRO
____ WCRO
____ SCRO
____ SWRO
____ VRO
____ Other Regional Office Staff: _____

ABILITY TO PAY GUIDANCE
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APPENDIX 2
APPLICATION FORM

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
BANKRUPTCY ABILITY TO PAY APPLICATION

Name of RP	
Address	
Telephone No.	
PC#/permit#/Reg# and Site Name	

INSTRUCTIONS

The Applicant must complete the information in the preceding box and submit the following supporting documentation:

1. A date-stamped copy of your Bankruptcy Petition.
2. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected party. (only submit if you are submitting this application to prove inability to pay for remediation of a petroleum release.
3. A copy of the financial responsibility demonstration mechanism in effect at the time the release was reported to DEQ.

The Applicant or an authorized representative of the Applicant must complete, sign and date the Declaration which follows. This signature must be notarized.

DECLARATION

BY SUBMITTING THIS ABILITY TO PAY APPLICATION, IN THE EVENT THE SITE IS REFERRED FOR STATE LEAD CORRECTIVE ACTION, THE APPLICANT AGREES TO GRANT THE COMMONWEALTH OF VIRGINIA, ITS EMPLOYEES, AGENTS AND CONTRACTORS ALL NECESSARY ACCESS TO THE CONTAMINATED SITE AND SURROUNDING PREMISES TO UNDERTAKE ALL NECESSARY INVESTIGATION AND REMEDIATION ACTIVITIES, INCLUDING BUT NOT LIMITED TO INSTALLATION, SAMPLING AND MAINTENANCE OF MONITORING WELLS; SOIL SAMPLING; INSTALLATION AND MAINTENANCE OF REMEDIATION EQUIPMENT; TESTING AND REMOVAL OF UNDERGROUND STORAGE TANKS; SURVEYING OF BUILDINGS FOR VAPOR IMPACTS; AND REMOVAL OF CONTAMINATED SOIL AND OTHER MEDIA.

THE APPLICANT FURTHER AGREES TO NOTIFY THE DEPARTMENT OF ENVIRONMENTAL QUALITY IMMEDIATELY IF THE CASE REFERENCED BY THE PETITION OR OTHER PLEADINGS IS DISMISSED OR REJECTED BY THE BANKRUPTCY COURT.

I declare that I agree to the above-stated conditions and I further declare that the information provided to the Department of Environmental Quality for the Bankruptcy Ability to Pay application of [fill in RP name] _____ is true, correct and complete to the best of my knowledge and belief.

By: _____ Title: _____

Name: _____ Date: _____

Commonwealth/State of _____)
) ss:
City/County of _____)

Subscribed and sworn to before me by _____ on this _____ day
of _____, 200____.

_____ My Commission expires: _____
Notary Public

ABILITY TO PAY GUIDANCE
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APPENDIX 3
INSURANCE
CERTIFICATION

INSURANCE CERTIFICATION

I, the undersigned, hereby certify that to the best of my knowledge and belief

(check one of the following):

_____ insurance is available (attach a copy of the policy, declarations page and endorsements)

_____ insurance is not available to cover costs associated with the environmental contamination at the site referenced by _____

PC# _____

I warrant and represent that I have the authority to make this certification.

Signature

Date _____

Name (please print)

Title (if any)

THIS STATEMENT MUST BE NOTARIZED

State/Commonwealth of _____:)
 _____) to wit:
 City/County of _____:)

Subscribed and sworn to before me by _____ on this
_____ day of _____, 200__.

Notary Public

My commission expires: _____.

ABILITY TO PAY GUIDANCE
BANKRUPT ENTITIES

APPENDIX 4
GALLONAGE AFFIDAVIT

CERTIFICATION OF ANNUAL GALLONAGE

PC# _____

NOW COMES _____, who being duly sworn, deposes and says:

(Name of Owner/Operator)

I, _____ of

(Name of Owner/Operator)

_____ declare that:

(Address)

The number of gallons pumped from _____ to _____

(start date)

(end date)

through all regulated underground storage tanks which owner/operator owns and operates in the

Commonwealth of Virginia is _____.

(Number of Gallons)

I swear that the declarations in the preceding affidavit are true to the best of my knowledge and belief.

(Print Name of Owner/Operator)

By: _____

(Signature)

State of _____)

) ss:

City/County of _____)

Subscribed and sworn to before me by _____ on this _____
day of _____, 200__.

Notary Public

My Commission expires: _____

ABILITY TO PAY GUIDANCE
BANKRUPT ENTITIES

APPENDIX 5
STORAGE CAPACITY
AFFIDAVIT

Commonwealth of Virginia)
)
City/County of _____) to wit:

Subscribed and sworn to before me by _____, on this
_____ day of _____, 200____.

Notary Public

My commission expires: _____